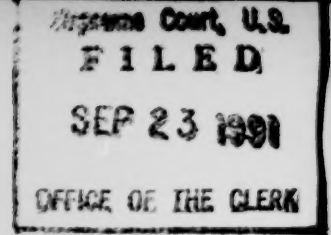


91-8044



NO.

**IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1991**

**DAVID C. MOGAN,
Petitioner,**

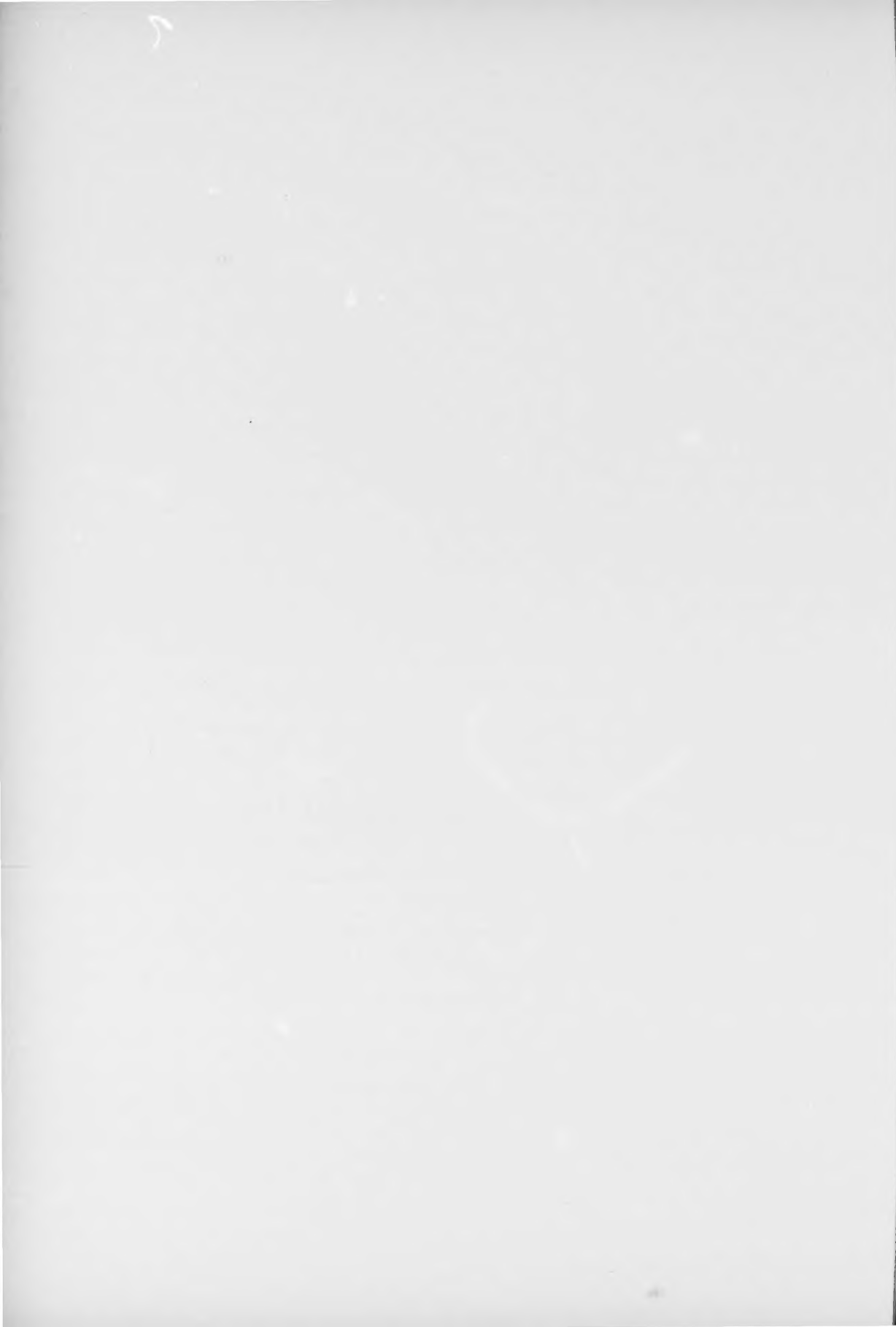
vs.

**THE PEOPLE OF THE STATE OF MONTANA,
Respondents.**

**PETITION FOR WRIT OF CERTIORARI FROM
THE SUPREME COURT OF MONTANA**

PETITION FOR WRIT OF CERTIORARI

**David C. Mogan
In Propria Persona
P.O. Box 366
Hinsdale, Montana 59241
(406) 364-2222**



QUESTIONS PRESENTED [Rule 14.1(a)]

1. Were the rights of Petitioner violated by the District Court, Fourteenth Judicial District in and for the State of Montana when said Court sentenced Petitioner to imprisonment for the trial of a misdemeanor even though the accused was not represented by counsel at sentencing.

2. Were the rights of Petitioner violated by the Supreme Court of Montana, a court which is bound to protect the same, when it improperly dismissed the Petitioner's appeal; which appeal concerned a criminal conviction based upon untested and improperly used Radio Detection and Ranging.

3. Were the rights of Petitioner violated by the County of Musselshell, State of Montana, when it, by and through the Musselshell County Attorney's Office, provided Petitioner with an illegible and unintelligible notice and a spurious affidavit subsequent thereto; upon which the Supreme Court of Montana summarily and arbitrarily relied upon in improperly dismissing that appeal aforesaid.

LISTING OF PARTIES TO PROCEEDINGS
[Rule 14.1(b)]

David C. Mogan was the defendant and petitioner in the Court below. The People of the State of Montana were the complainants and respondents in the Court below.

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Justice Marshall 14

ORDERS DELIVERED BY THE COURT [Rule 14.1(d)]

A. Order by the Supreme Court of Montana, dated June 6, 1991, wherein said Court dismissed Petitioner's appeal then pending before it [Appendix "A"].

B. Order by the Supreme Court of Montana, dated June 25, 1991, wherein said Court denied Petitioner's Motion for Rehearing concerning the dismissal aforesaid [Appendix "B"].

C. Order by the Fourteenth Judicial District Court, filed November 30, 1990, wherein sentence of imprisonment, fines and costs was ordered against Petitioner herein [Appendix "C"].

GROUND'S OF JURISDICTION OF SUPREME COURT
[Rule 14.1(e)]

This Writ arises from the improper dismissal of Petitioner's appeal pending before the Supreme Court of Montana; the same being an appeal of a criminal conviction wherein imprisonment was ordered.

The Order dismissing Petitioner's appeal aforesaid by the Supreme Court of Montana was entered on the 6th day of June, 1991. Petitioner submitted a 'Motion for Rehearing' and 'Memorandum in Support' with the Clerk of the Supreme Court of Montana on the 18th day of June, 1991. This Motion was also improperly denied on the 25th day of June, 1991. Copies of these Orders aforesaid are attached hereto as Appendices "A" and "B", respectively.

Petitioner's Notice to Appeal was filed timely of even date herein, on the 23rd day of September, 1991, with the Clerk of the Supreme Court of Montana; a copy of which is

attached hereto as Appendix "D".

The jurisdiction of the Supreme Court is invoked by the Respondent's abridgement of Petitioner's rights guaranteed to him under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES
[Rule 14.1(f)]

Amendment V, United States Constitution:

"No person shall ... be deprived of life, liberty, or property, without due process of law ..."

Amendment VI, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to ... public trial [appellate process]."

Amendment VIII, United States Constitution:

" ... nor cruel or unusual punishment inflicted."

Amendment XIV, United States Constitution:

"No state shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article IV, Section 2, United States Constitution:

"The Citizens of each State shall be entitled to all privileges and immunities of Citizens of the several States."

Exodus, Chapter 18, Section 22, Holy Bible:

"And let them judge the people at all seasons: and it shall be that every great matter they shall bring unto thee, but every small matter they shall judge: ..."

Deuteronomy, Chapter 1, Section 17, Holy Bible:

"Ye shall not respect persons in judgement; but ye shall hear the small as well as the great; ye shall not be afraid of the face of men; for the judgement is God's: and the cause that is too hard for you, bring it unto me and I will hear it."

Agersinger v. Hamlin, 407 US 25:

"Under the rule, we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local laws permit it, unless the accused is represented by counsel."

Hempa v. Rhay, 389 US 128:

"Sentencing has been held to be a 'critical stage' of the criminal

proceeding requiring assistance of appointed counsel."

Simon v. Craft, 182 US 427:

"The essential elements of due process of law are notice and opportunity to defend."

Secretary of Agriculture v. Central Roig Refining Co., 338 US 604:

"The guaranty of due process reflects traditional notices of justice."

Rule 11(c), Montana Rules of Appellate Procedure:

Dismissal for failure of appellant to cause timely transmission or to docket appeal. If the appellant shall fail to cause timely transmission of the record or to pay the filing fee if a filing fee is required, any respondent may file a motion in the supreme court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the district court showing the date and substance of the judgment or order from which the appeal was filed, and the expiration date of any order extending the time for transmitting the record; and by proof that 7 days' notice in writing has been served on the appellant that application will be made for dismissal of the appeal. [Emphasis added.]

No.

IN THE
SUPREME COURT of the UNITED STATES
October Term, 1991

DAVID C. MOGAN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MONTANA,
Respondents.

PETITION FOR CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MONTANA

Petitioner, DAVID C. MOGAN, respectfully
prays that a writ of certiorari issue to
review the judgement and opinion of the
Supreme Court of the State of Montana.

STATEMENT OF THE CASE [Rule 14.1(g)]

This case arises from an original appeal filed with the Montana Supreme Court concerning a criminal conviction against the Petitioner herein, wherein imprisonment was ordered, together with hundreds of dollars of fines and costs.

In short, the Petitioner has been on the receiving end of the wrath of the prosecutor for demanding the protection guaranteed to Petitioner by the laws and Constitution of the United States. Woe unto the unsuspecting citizen who dare question the radar trap operating presently in the city of Roundup, Montana.

The appeal by the Petitioner to the Montana Supreme Court set forth in specific detail as to why the conviction cannot stand, to-wit: The use of untested and improperly used radar equipment and imprisonment which is clearly prohibited by well-settled case

law of the United States Supreme Court, ie.,
Agersinger v. Hamlin, 407 US 25.

On the 6th day of June, 1991, the
Supreme Court of Montana dismissed
Petitioner's appeal.

Petitioner filed a Motion for Rehearing,
and the same Court did on the 25th day of
June, 1991, also deny Petitioner's Motion.

The Court aforesaid found that the
Petitioner had failed to timely transmit the
record on appeal as required by Rule 10(a),
Montana Rules of Appellate Procedure.

However, Rule 11(c), Montana Rules of
Appellate Procedure, dictate that '7 days
notice' must be given as a prerequisite to
such dismissal.

In short, the Supreme Court of Montana
improperly dismissed the Appellant's appeal
aforesaid; which such dismissal was based
upon the State's Motion to Dismiss for
Appellant's alleged failure to transmit the

record.

The State's Motion to Dismiss, as well as the ruling of the Supreme Court of Montana's decision in granting same, was based upon the State having complied with:

1. Rule 11(c) which requires a 7 days notice to Appellant;
2. Affidavit that said notice had been sent.

First, the State sent an illegible and unintelligible notice to Appellant; which such notice the Appellant requested from the Clerk of Montana Supreme Court, is attached hereto as Appendix "E1". Petitioner sent the original notice [Appendix "E1"] to the Clerk of the Montana Supreme Court, and as such, will be transmitted to the Court directly by said Clerk of the Montana Supreme Court. Appendix "E2" is a legible copy.

Second, as the notice sent was illegible and unintelligible, the State's Affidavit is spurious, which such Affidavit is attached

hereto as Appendix "F".

Further, the Appellant has made every effort to effect timely transmittal of the record on appeal. Specifically, Appellant made diverse and sundry attempts, the same being self-evident and self-explanatory and attached hereto as Appendices "G1", "G2", "G3" and "G4".

The Supreme Court of Montana improperly dismissed Appellant's appeal based upon an illegible and unintelligible notice and a spurious affidavit concerning the same. The actual notice sent by the State herein is Appellant's prima facia evidence that no good and sufficient notice was sent. What can't be read, neither understood, is not notice.

This case is of fundamental importance in that the Respondent has, under color of law, systematically denied Petitioner access to the protections of the appellate process, and in so doing, has abridged Petitioner's V,

VI, VIII and XIV Amendment rights.

The Respondent will assert that this Writ is foreclosed by the doctrine of procedural bar; however, the same cannot so affix to this case.

Whenever any state violates its own published rules, the doctrine of procedural bar cannot so affix. Rule 11(c), Montana Rules of Appellate Procedure, patently require notice; which such notice is wanting [see Appendix "E1"].

SUBSTANTIALITY OF FEDERAL QUESTION
[Rule 14.1(h)]

This writ presents an important and substantial question of the first impression, as hereinafter described, in that the issue it presents is the constitutionality of denying and abridging the people of the State the ability and access to the appellate process, most especially where the same concerns a criminal conviction when

imprisonment was imposed.

Appellant was never afforded the opportunity to present his case on appeal and to establish significant defects which would dictate an acquittal by well-settled case law of the United States Supreme Court.

As a result of the improper dismissal, the United States Supreme Court has become the only Court wherein Appellant can seek satisfaction.

APPELLANT'S ARGUMENT ON QUESTION PRESENTED #1
[Rule 14.1(j)]

Clearly the rights of Petitioner are violated by the District Court's Order wherein imprisonment was imposed for a misdemeanor [Appendix "C"].

Agersinger v. Hamlin, 407 US 25, prohibits imprisonment even though local law permits it unless the accused is represented by counsel.

In the case at bar, the Appellant was

not represented by counsel at sentencing; which has been held to be a 'critical stage' of the criminal proceeding, Mempa v. Rhay, 389 US 128.

Absent counsel at such 'critical stage', ie., sentencing, the protections and immunities of Agersinger v. Hamlin must affix, and as such, no imprisonment may be imposed.

**APPELLANT'S ARGUMENT ON QUESTIONS PRESENTED
#2 AND #3 [Rule 14.1(j)]**

On the 19th day of April, 1991, the Respondent made a certain 'Motion to Dismiss and Supporting Memorandum'; wherein Respondent asserted that the appeal must be dismissed due to the failure of the Appellant to timely transmit the record as per Rule 11(c), Montana Rules of Appellate Procedure.

The Respondent asserted that it was entitled to a "black letter" interpretation and to that end further asserted that it had

complied with Rule 11(c) when the Musselshell County Attorney served Mogan on January 23, 1991, a notice of Respondent's intent to file a motion to dismiss the appeal, ... as reflected by an affidavit ... prepared by the County Attorney on April 12, 1991, [see Appendices "E1" and "F"].

A "black letter" interpretation of Rule 11(c) clearly requires as a prerequisite to dismissal 'proof that 7 days notice in writing has been served on the Appellant that application will be made for dismissal of the appeal'.

In short and summary, that notice which the Respondent sent to Appellant, as is required as a prerequisite to dismissal as per Rule 11(c) was and still is illegible and unintelligible; actual copy State sent to Petitioner is Appendix "E1", Court's copy is Appendix "E2".

Natural reason and understanding dictate

that an illegible and unintelligible notice is not and cannot constitute good and sufficient notice of anything.

The essential elements of due process of law are notice and opportunity to defend, Simon v. Craft, 182 US 427.

Rule 27, Montana Rules of Appellate Procedure requires that:

"Form of ... briefs, ... motions and other papers (notices) shall be produced by any standard printing process, by typewriter or by an equivalent process capable of producing a clear black image on white paper."

Therefore, the Respondent's purported notice must fall, and as such, the County Attorney's affidavit is spurious.

For the Respondent to prevail, it must first show that '7 days notice was given' [which, based upon the aforesaid, no good and sufficient notice was ever given] and that the Petitioner failed to timely transmit the record pursuant to Rule 10(a), Montana Rules

of Appellate Procedure.

To that end, Petitioner avers that he did make every reasonable effort to effect transmittal of the record; however, it was the Musselshell District Court itself and personnel thereof that is the proximate cause of late transmittal.

First, the record was transmitted to the Clerk of Supreme Court of Montana on January 16, 1991; which date is only shortly after the final 'Order and Judgment' of the Musselshell District Court filed on November 30, 1990.

Second, Appellant's reasonable and prudent efforts to effect timely transmittal are self-evident of the same as set forth in those letters attached hereto as Appendices "G1", "G2", "G3" and "G4", respectively.

The Respondent seeks to vex Appellant with the pains and penalties of dismissal of Appellant's appeal of a criminal conviction

wherein incarceration was ordered due to untimely transmittal; however, it is the Respondent itself who was the proximate cause of the same.

Section 3-5-604(4), Montana Code Annotated, provides that the State is to furnish such transcript, and as such, the State is the proximate cause of delay, if any.

If the Musselshell County Court simply will not transmit timely and as Petitioner lacks power to compel transmittal, each petitioner will lose every appeal in that all such appeals can therefore be dismissed by Rule 10(a). All the State prosecutor has to do is tell the court not to timely transmit and then the respondent can simply dismiss any pending appeal. This is very neat and clean for the state prosecutor, no regard is had what scorn and derision thereby it accrues to the great State of Montana nor for

the rights of its citizens.

Further, the State cannot rely upon the doctrine of procedural bar due to the want of notice as clearly required by Rule 11(c) and those numerous efforts made by Appellant to effect timely transmittal.

Clearly, the Petitioner's V, VI, VIII and XIV Amendment rights have been abridged and violated by the Supreme Court of Montana in its dismissal of the Petitioner's appeal absent the State's compliance with the notice requirements as dictated by Rule 11(c), Montana Rules of Appellate Procedure.

The State's notice [Appendix "E1"], which can neither be read nor understood and the State's Affidavit [Appendix "F"], which is spurious at best due to the illegibility and unintelligibility of notice aforesaid cuts to the quick of justice; the same being that the guarantee of due process reflects traditional notices of justice, Secretary of

US 604.

The notice itself [Appendix "E1"] constitutes a prima facia case of error, at best. Chief Justice Marshall once stated:

"I have always thought from my earliest youth, 'till now, that the greatest scourage an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt, or dependent Judiciary."
Chief Justice Marshall

The appellate process is so fundamental to our system that to mention all of the historical struggles and conflicts concerning the same would fill many books. Suffice it to say that appeals are the basis of our system of jurisprudence as codified in Exodus 18:22 and Deuteronomy 1:17 of the Holy Bible.

CONCLUSIONS

Accordingly, the imposition of imprisonment violates Petitioner's V, VII, VIII and XIV Amendment rights. Moreover,

Article IV, Section 2, US Constitution, dictates that Agersinger v. Hamlin, affix so as to prevent any imprisonment whatsoever.

In regards to Questions presented #2 and #3, absent a legible and intelligible notice, the dismissal action of the Supreme Court of Montana is clearly in error and violates Petitioner's constitutional rights.

Further, the Petitioner's efforts as evidenced by Appendices "G1", "G2", "G3" and "G4" are self-evident, and as such, constitute a sufficient attempt which a reasonable and prudent man would make so as to effect timely transmittal of the record. The law respects form less than substance, Section 1-3-219, Montana Code Annotated.

Petitioner stands in jeopardy of severe loss of liberty by way of imprisonment and loss of drivers license, ie., ability to travel to work and secure a living. In short, no one should suffer from the act of

another, Section 1-3-211, Montana Code Annotated.

Come now, let us reason together. The notice [Appendix "E1"] is illegible, and as such unintelligible. Whoso can say otherwise. Also, see Petitioner's Affidavit of May 22, 1991, to that end [Appendix "H"].

WHEREFORE, the United States Supreme Court must exercise its jurisdiction in this case so as to preserve the appellate process and constitutional rights of the citizens or lawlessness will reign supreme in Montana.

Respectfully submitted to the Honorable Supreme Court of the United States, this 15th day of the eleventh month, that is to say the month of November in the year of our Lord and Savior, Jesus Christ, One Thousand Nine Hundred Ninety-One.

DAVID C. MOGAN, Petitioner
In Propria Persona



APPENDICES A THROUGH H



APPENDIX "A"

FILED
June 6, 1991
Ed Smith
Clerk of Supreme Court
State of Montana

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 91-035

STATE OF MONTANA,)	
)	
Plaintiff and Respondent,)	
)	
-v-	)	ORDER
)	
DAVID C. MOGAN,)	
)	
Defendant and Appellant.)	

On April 19, 1991, the State of Montana filed a motion to dismiss the appeal of David Mogan for failure to timely transmit the District Court record pursuant to Rule 10(a), M.R.App.P. On April 26, 1991, appellant was granted 30 days to file a brief in opposition to the motion to dismiss. The brief was timely filed, and after due consideration,

The State's motion to dismiss is
GRANTED.

The Clerk of the Supreme Court
shall mail copies of this Order to all
parties of record.

DATED this 6th day of June, 1991.

/s/
Justices of the Supreme Court

APPENDIX "B"

FILED
June 25, 1991
Ed Smith
Clerk of Supreme Court
State of Montana

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 91-305

STATE OF MONTANA,)	
)	
Plaintiff and Respondent,)	
)	
-v-	)	ORDER
)	
DAVID C. MOGAN,)	
)	
Defendant and Appellant.)	

On June 19, 1991, the appellant, David C. Mogan, filed a petition for rehearing pursuant to Rule 34, M.R.App.P., and statement in support thereof. That petition was accompanied by a petition for suspension of the rules to allow oral argument.

The following is a chronology of the record to date in appellant's appeal:

10/01/90: Found guilty by a jury of speeding (Musselshell County). Sentenced to five days in jail, fined \$50, plus \$864.17 to reimburse the county for his court-appointed attorney.

10/18/90: Notice of appeal filed.

01/16/91: Record transmitted to clerk of court.

01/23/91: Musselshell County Attorney filed notice of respondent's intent to file motion to dismiss appeal with the Supreme Court. Motion to dismiss not actually filed until 4/19/91.

02/08/91: Appellant acknowledges receipt of notice via certified mail.

02/12/91: Appellant requested and was granted an extension until 3/18/91 to file his brief.

03/12/91: This Court granted a 30-day extension to prepare, file, and serve appellant's brief.

04/12/91: Musselshell County Attorney filed an affidavit stating an application would be made for dismissal of the appeal.

04/18/91: This Court granted appellant an additional 30 days, until 5/18/91, for filing his brief.

04/19/91: Musselshell County Attorney filed motion to dismiss and supporting memorandum, relying on Rule 10(a), M.R.App.P., which provides for a 40-day period within which to transmit the record, and Rule 11(c), M.R.App.P., which provides the procedures to be followed by respondent in moving to dismiss in the event of failure to timely transmit the record.

04/26/91: Appellant granted a 30-day extension to file brief in opposition to motion to dismiss.

05/23/91: Appellant's brief in opposition filed, citing the illegibility of the State's notice of intent to file motion to dismiss as grounds for denial of the motion. Also claiming that he made every reasonable effort to comply with the timely filing of the record requirement. As evidence thereof, attached to brief were inquiries to the clerk of the district court regarding the record.

06/06/91: This Court granted State's motion to dismiss the appeal.

The Court has found nothing in the record or in the latest communication from

the appellant to warrant any reconsideration of its June 6, 1991, order dismissing the appeal. The Clerk of the Supreme Court is instructed not to accept any additional documents from the appellant concerning this matter.

The Clerk of the Supreme Court shall mail copies of this Order to all parties of record.

DATED this 25th day of June, 1991.

/s/
Justices of the Supreme Court

APPENDIX "C"

23 No. DC 90-08

FILED this 30th day of
Nov. 1990

Dona C. Robson

Clerk of District Court

By _____
Deputy Clerk

JDG-150

Nc-1053

MONTANA, FOURTEENTH JUDICIAL DISTRICT COURT,
MUSSELSHELL COUNTY

* * * * *

STATE OF MONTANA,)	
	)	Cause No. DC 90-08
Plaintiff,)	
	)	<u>ORDER AND JUDGMENT</u>
-v-)	
)	
DAVID C. MOGAN,)	
)	
Defendant.)	

* * * * *

A six person jury trial was held in
the above-captioned matter on October 1,
1990. The jury delivered a verdict of,
"Guilty of the offense of misdemeanor,
to-wit: Speed Restrictions" (speeding) under
Section 61-8-303 M.C.A.

A sentencing hearing was set for and held on October 15, 1990. At the sentencing hearing, the STATE OF MONTANA, was represented by Floyd A. Brower, Deputy County Attorney for Musselshell County. The Defendant was present and acted pro se and waived his right to have an attorney present and represent him at sentencing.

The Court considers all matters, including evidence of the defendant's high speed in a posted 35 miles per hour area which was substantially residential, and imposes sentence as follows:

SENTENCE AND ORDER

IT IS HEREBY ORDERED that:

1. The Defendant is sentenced to serve five (5) days in the Musselshell County jail. The Defendant is to appear at the Musselshell County jail no later than 5:00 o'clock p.m. on Friday, October 19, 1990 to start serving said jail sentence unless the

Defendant has filed his Notice of Appeal with the Clerk of the above-entitled Court by that time, in which event sentence is stayed during appeal. Defendant shall be allowed to serve his sentence as follows:

The Defendant shall present himself at the Musselshell County jail for admittance no later than 7:00 o'clock a.m. on Fridays and shall be released at 7:00 o'clock a.m. on Sundays, until his sentence has been fully served (being 2 1/2 weekends).

2. The Defendant shall pay to the Clerk of the District Court a fine in the amount of FIFTY DOLLARS (\$50.00).

3. The Defendant shall pay to the Clerk of the District Court an assessment in the amount of TEN DOLLARS (\$10.00), pursuant to Section 46-18-236, Montana Code Annotated.

4. The Defendant shall pay to the Clerk of the District Court the sum of EIGHT HUNDRED SIXTY-FOUR AND 17/100ths DOLLARS

(\$864.17) to reimburse Musselshell County for the cost of Defendant's Court appointed attorney. The payment of said court-appointed attorneys fees shall be paid as follows:

The Defendant shall make monthly payments of at least TWENTY-FIVE DOLLARS (\$25.00) beginning on November 1, 1990 and at least \$25.00 on the 1st day of each subsequent month. Defendant will pay the total \$864.17 in full through the Clerk of the District Court on or before October 15, 1991. Said \$864.17 shall be considered and treated as a judgment lien until paid in full.

DATED the 15th day of October,
1990.

/s/

Roy C. Rodeghiero
District Judge

APPENDIX "D"

DAVID C. MOGAN
366 Minnesota Street
P.O. Box 366
Hinsdale, Montana 59241
Telephone: (406) 364-2222

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 91-035

STATE OF MONTANA,)	
)	
Plaintiff and Respondent,	)	NOTICE TO
	)	APPEAL
-v-	)	-AND-
	)	REVIEW
DAVID C. MOGAN,)	
)	
Defendant and Appellant.)	

COMES NOW the Appellant, DAVID C. MOGAN, in his own proper person, de jure [appearing specially and not generally herein]; and does by these presents give notice to the Montana State Supreme Court, that Appellant will appeal the order of the Court No. 91-035, issued by the Court on June 6, 1991, and the order of the Court No. 91-035, issued by the Court on June 25, 1991,

to the United States Supreme Court.

Respectfully submitted and dated
this 23rd day of September, 1991.

/s/

DAVID C. MOGAN
In Propria Persona

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing NOTICE TO APPEAL AND REVIEW were duly served by mail upon the opposing attorneys of record, VICKIE KNUDSEN and GEORGE SCHUNK, at their addresses as shown below, by depositing the same in the United States mail, postage prepaid, this 23rd day of September, 1991.

Vickie Knudsen
Musselshell County Attorney
26 Main Street - P.O. Box 236
Roundup, Montana 59072

-and-

George Schunk
Assistant Attorney General
Justice Building
215 North Sanders
Helena, Montana 59620-1401

/s/

DAVID C. MOGAN
Appellant

APPENDIX "E1"

The Clerk of the Honorable United States Supreme Court has noted that Appendix "E1" is "totally illegible" and need be corrected.

The basis of Petitioner's argument on #3 of the 'Questions Presented' is the very fact that the same is "totally illegible", and as such, could not then and cannot presently constitute good and sufficient notice [see Petitioner's Affidavit, Appendix "H"].

Accordingly, Appendix "E1" represents a copy of that actual notice sent by the State to Petitioner [see Appendix "E2" for a legible copy].

APPENDIX "E1"

[Actual copy of notice sent to Petitioner by
State, illegible and unintelligible.]

Vicki R. ...
Montana ...
17 Main
P.O. Box ...
Butte, Montana 59701
Telephone: ...
Attorney for State of Montana

MONTANA FOURTH JUDICIAL DISTRICT COURT,

IN AND FOR THE COUNTY OF BUTTE, MONTANA

STATE OF MONTANA

Case No. CV 90-08

Plaintiff,

DAVID C. ...

NOTICE OF RE-CONDEMNATION
TO HOLD MOTION ...
APPEAR AT THE SUPREME COURT
ON THE 27th OF ...

236

(S)

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of January, 1991, the foregoing was duly served by certified mail, return receipt requested, upon Defendant, DAVID C. MOGAN, at his last known address as follows:

David C. Mogan
P.O. Box 366
Gardiner, Montana 59711

[Signature]
Vicki Knudsen
Mustelshell County Att. Gen.

APPENDIX "E2"
[Court's legible copy]

271
No. DC 90-08
FILED this 23rd day of
January, 1991
Dona C. Robson
Clerk of District Court
By _____
Deputy Clerk

Vickie Knudsen
Musselshell County Attorney
26 Main
P.O. Box 236
Roundup, MT 59072
Telephone: (406) 323-2230
Attorney for State of Montana

MONTANA FOURTEENTH JUDICIAL DISTRICT COURT,

IN AND FOR THE COUNTY OF MUSSELSHELL

* * * * *

STATE OF MONTANA,	) Cause No. DC 90-08
)
Plaintiff,	) NOTICE OF RESPONDENT'S
	) INTENT TO FILE MOTION
-v-	) TO DISMISS APPEAL TO
	) THE SUPREME COURT OF
DAVID C. MOGAN,	) THE STATE OF MONTANA
)
Defendant.)

* * * * *

COMES NOW, VICKIE KNUDSEN, attorney
for the State of Montana, and hereby gives

notice to Defendant and Appellant, DAVID C. MOGAN, of the intent of the State of Montana to file a Motion to Dismiss the appeal in the above-named matter.

DATED this 23rd day of January,
1991.

/s/
Vickie Knudsen

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of January, 1991, the foregoing was duly served by certified mail, return receipt requested, upon Defendant, DAVID C. MOGAN, at his last known address as follows:

David C. Mogan
P.O. Box 366
Hinsdale, Montana 59241

By: /s/
Vickie Knudsen
Musselshell County Attorney

APPENDIX "F"

Vickie Knudsen
Musselshell County Attorney
26 Main
P.O. Box 236
Roundup, MT 59072
Telephone: (406) 323-2230
Attorney for State of Montana

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 91-035

STATE OF MONTANA,)	
)	
Plaintiff and Respondent,)	
)	
-v-	)	AFFIDAVIT
)	
DAVID C. MOGAN,)	
)	
Defendant and Appellant.)	

STATE OF MONTANA)	
	)	ss.
County of Musselshell)	

Vickie Knudsen, being duly sworn,
deposes and says:

(1) That I am the County Attorney
for Musselshell County, State of Montana.

(2) That on January 23, 1991, I
filed a Notice of Respondent's Intent to File

Motion to Dismiss Appeal to the Supreme Court of the State of Montana, as well as a Certificate of Service that said Notice was sent to Defendant, DAVID C. MOGAN, on same date.

(3) That Defendant, DAVID C. MOGAN, signed for said Notice by certified mail, Article Number P478668575, on February 8, 1991. Said Receipt is attached hereto and by reference made a part hereof.

(3) That this affidavit is submitted as proof that seven (7) days' notice in writing has been served on the defendant and appellant that application will be made for dismissal of the appeal as required by Rule 11(c) of the Rules of Appellate Procedure.

DATED this 12th day of April, 1991.

/s/
Vickie Knudsen, Affiant

SUBSCRIBED AND SWORN TO before me
this 12th day of April, 1991.

/s/

Notary Public for the State
of Montana

Residing at Roundup, Montana

(NOTARIAL SEAL) My Commission Expires:

11-1-91

APPENDIX "G1"

DAVID C. HOGAN & ASSOCIATES

366 Minnesota Street
P.O. Box 366
Hinsdale, Montana 59241

Telephone: (406) 364-2222

October 23, 1990

Clerk of District Court
Musselshell County Courthouse
Roundup, Montana 59072

Re: Cause No. DC 90-08

Dear Clerk:

Please provide the Court Reporter
with this letter at your earliest
opportunity.

I am writing to inquire as to what
a transcript would cost of the following:

1. October 1, 1990 trial; \$400.00
(approximate)

2. October 15, 1990 sentencing
hearing. \$150.00 (approximate)

Please advise as to the approximate
cost and also how you handled payment of the
transcription costs.

I await the pleasure of your reply
and look forward to the same forthwith.

Sincerely,

/s/
DAVID C. MOGAN

APPENDIX "G2"

DAVID C. MOGAN & ASSOCIATES

366 Minnesota Street
P.O. Box 366
Hinsdale, Montana 59241

Telephone: (406) 364-2222

November 20, 1990

Clerk of District Court
Musselshell County Courthouse
Roundup, Montana 59072

Re: Cause No. DC 90-08

Dear Clerk:

Please provide, John, the Court
Reporter, with this letter at your
convenience.

I had the opportunity with which to
check concerning the acceptability of a
partial transcript, and the rules do provide
for the same.

Therefore, I would like to inquire as to what a partial transcript would cost of the following:

1. All in chambers sessions on October 1, 1990; and
2. All testimony (including questions asked of officer) of the Sheriff on October 1, 1990.

Again, please advise as to the approximate cost and how payment is perfected.

Thank you for returning my call today, and I await the pleasure of your reply and looking forward to he same forthwith.

With kindest personal regards, I remain,

Maranatha,

/s/
DAVID C. HOGAN

APPENDIX "G3"

DAVID C. MOGAN & ASSOCIATES

366 Minnesota Street
P.O. Box 366
Hinsdale, Montana 59241

Telephone: (406) 364-2222

December 19, 1990

Clerk of District Court
P.O. Box 357
Roundup, Montana 59072

Re: Cause No. DC 90-08

Dear Ms. Robson:

Please provide John, the Court
Reporter, with this letter at your earliest
convenience.

Please provide and prepare a
partial transcript of the following:

1. All in chambers sessions on
October 1, 1990; and

2. All testimony (including questions asked of the officer) of the Sheriff on October 1, 1990.

I will send you \$150.00 under separate cover on December 17, 1990, and will pay the balance upon delivery of the aforesaid transcript.

With kindest personal regards, I remain,

Maranatha,

/s/
DAVID C. MOGAN

APPENDIX "H"

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 91-035

* * * * *

STATE OF MONTANA,
Plaintiff
and Respondent,

-v-

DAVID C. MOGAN,
Defendant
and Appellant.

*
*
*
*
*
* APPELLANT'S AFFIDAVIT
*
*
*
*
*
*

* * * * *

STATE OF MONTANA)
: ss.
COUNTY OF VALLEY)

I, DAVID C. MOGAN, do declare that
the facts set forth hereinbelow, to the best
of my knowledge and belief, are accurate,
correct and complete, and that my yea shall
be yea and my nay, nay, to-wit:

1. That I am the Defendant and
Appellant in the cause of action aforesaid;

2. That I have appeared therein in

my own proper person, dejure;

3. That the document attached hereto as Exhibit "A" consisting of a certain unintelligible 'Notice' and certified 'envelope' is the original document which I received from the Musselshell County Attorney;

4. That I cannot read that 'Notice' attached hereto, neither as a layman could I discern what the same represented at the time I received the same on or around February 8, 1991, at 8:50 a.m.;

5. That I am not an attorney nor schooled in the law.

Defendant and Appellant further sayeth not.

DATED this 22nd day of May, 1991.

/s/

DAVID C. MOGAN
Defendant and Appellant

SUBSCRIBED and SWORN TO before me
this 22nd day of May, 1991.

/s/
Notary Public for the State of Montana
Residing at _____
My Commission expires: _____
(NOTARIAL SEAL)

CERTIFICATE OF SERVICE

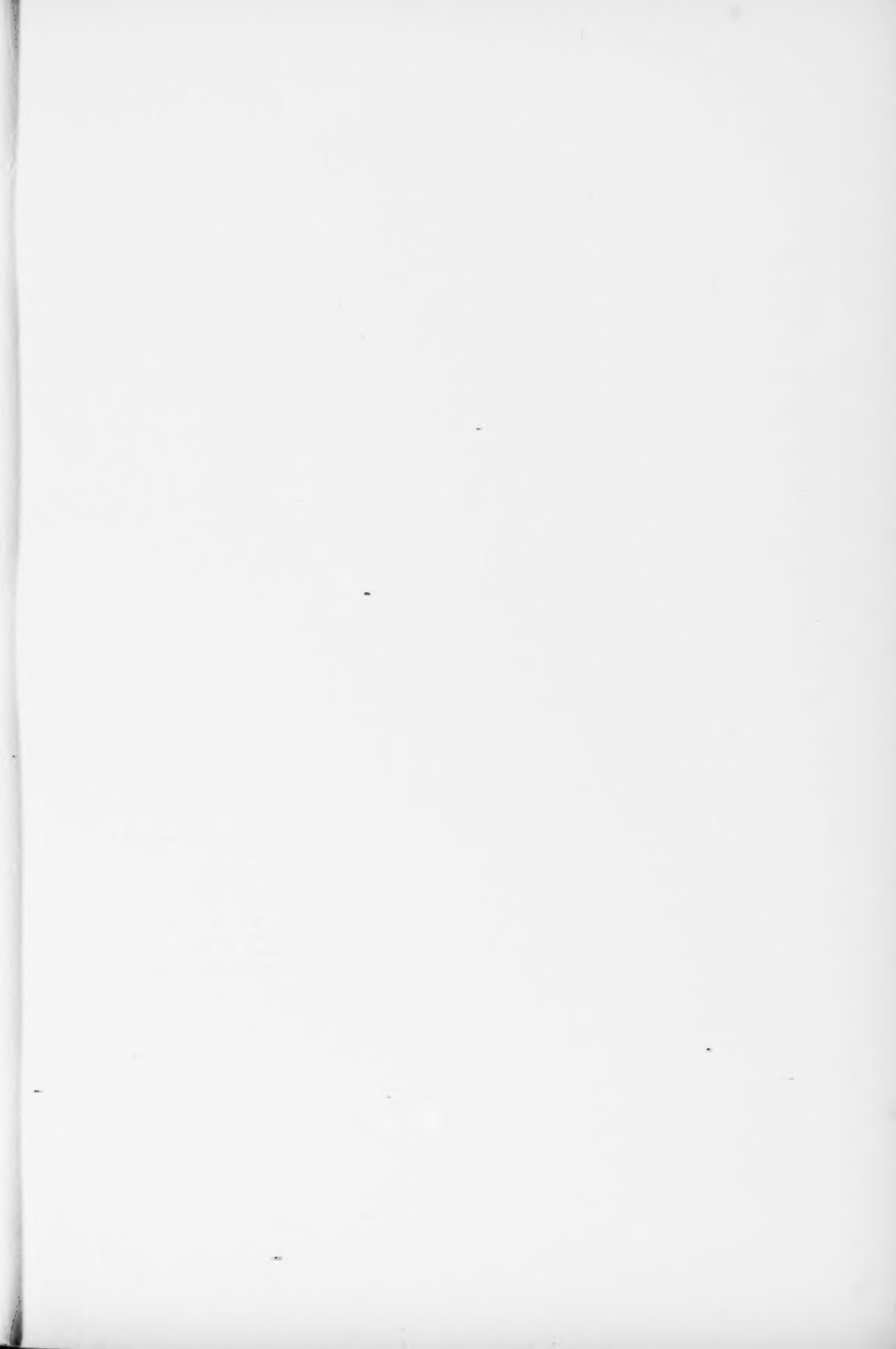
This is to certify that a copy of
the foregoing APPELLANT'S AFFIDAVIT was duly
served by mail upon the opposing attorneys of
record, VICKIE KNUDSEN and GEORGE SCHUNK, at
their addresses as shown below, by depositing
the same in the United States mail, postage
prepaid, this 23rd day of May, 1991.

VICKIE KNUDSEN
Musselshell County Attorney
P.O. Box 236
Roundup, Montana 59072

-and-

GEORGE SCHUNK
Assistant Attorney General
Justice Building
215 North Sanders
Helena, Montana 59620-1401

/s/
DAVID C. MOGAN



2
No. 91-804

SUPREME COURT, U.S.
FILED

JAN 10 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States
January Term, 1992

-----◆-----

DAVID MOGAN,

Petitioner,

vs.

STATE OF MONTANA,

Respondent.

-----◆-----
On Petition For A Writ Of Certiorari
To The Supreme Court of Montana

-----◆-----
**BRIEF IN OPPOSITION TO PETITION
FOR CERTIORARI**
-----◆-----

MARC RACICOT
Attorney General
GEORGE M. SCHUNK*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401
(406) 444-2026

*Counsel of Record

January 1992

QUESTION PRESENTED

Whether this Court has certiorari jurisdiction to review orders of the Montana Supreme Court dismissing an appeal for failure of the petitioner to timely transmit the record.

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STATEMENT OF THE CASE

The petitioner, David Mogan, was found guilty of the offense of violation of speed restrictions, Mont. Code Ann. § 61-8-303 (1989), following a jury trial held October 1, 1990, in the district court of Musselshell County. A sentencing hearing was held October 15, 1990, and Mogan was sentenced to five days in the county jail and fined \$50. Additionally Mogan was ordered to pay the clerk of the district court \$864.17 to reimburse Musselshell County for the cost of his court-appointed attorney. Imposition of the sentence was stayed provided Mogan exercised his appeal rights.

A notice of appeal was filed by Mogan on October 18, 1990. The petitioner filed no motion with the Montana Supreme Court to extend the 40-day period in which to submit the district court record. The district court record was submitted to the Clerk of the Montana Supreme Court on January 16, 1991. The Musselshell County Attorney served Mogan on January 23, 1991, with a notice of respondent's intent to file a motion to dismiss the appeal pursuant to Mont. R. App. P. 11(c). Such notice was received by Mogan on February 8, 1991, as reflected by an affidavit and supporting domestic return receipt, prepared by the county attorney on April 12, 1991. The clerk of the district court executed, on April 12, 1991, a certificate showing the date and substance of the judgment from which the appeal was taken, the date on which the notice of appeal was filed, and the fact that no order granting an extension of time in which to transmit the record was filed.

In reliance upon the Montana Rules of Appellate Procedure and the above-referenced documents, the Montana Attorney General filed a motion to dismiss Mogan's appeal on April 19, 1991. The State's motion to

dismiss the appeal was granted by the Montana Supreme Court on June 6, 1991. (Pet. App. A.) On June 19, 1991, Mogan filed a petition for rehearing pursuant to Mont. R. App. P. 34. This petition was denied in an order of the Montana Supreme Court dated June 25, 1991. (Pet. App. B.)



SUMMARY OF ARGUMENT

This Court should deny the petition for writ of certiorari because the Montana Supreme Court's orders dismissing petitioner's appeal present no federal question over which jurisdiction exists under 28 U.S.C. § 1257(a).



ARGUMENT

The petitioner attempts to invoke this Court's certiorari jurisdiction to review the Montana Supreme Court's application of its rules of appellate procedure. Additionally, petitioner seeks review of a state district court proceeding in which he was sentenced. This Court is without certiorari jurisdiction to review a Montana district court decision as these courts are not "the highest court of a state in which a decision could be had." 28 U.S.C. § 1257(a).

This Court does not have a general supervisory power over state courts. In reviewing a state court judgment, the Court is confined to evaluating that judgment's correctness with reference to the federal Constitution or federal laws. Chandler v. Florida, 449 U.S. 560, 570 (1981). The Montana Supreme Court orders at issue here simply determined, pursuant to the Montana Rules of Appellate

Procedure, that Mogan's appeal should be dismissed as he failed to timely transmit the record of the underlying prosecution. The Montana Supreme Court interpreted no federal constitutional right or federal law. This Court has no certiorari jurisdiction under 28 U.S.C. § 1257(a) to review such orders that are based wholly on state law. International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 387 (1986). Despite the petitioner's vague references to federal constitutional rights, the petition actually raises no federal question of law.

-----◆-----
CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MARC RACICOT
Attorney General
GEORGE SCHUNK*
Assistant Attorney General
State of Montana
Justice Building
215 North Sanders
Helena MT 59620-1401

*Counsel of Record

January 1992

3
No. 91-804

Supreme Court, U.S.

FILED

JAN 21 1992

OFFICE OF THE CLERK

**IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1991**

**DAVID C. MOGAN,
Petitioner,**

vs.

**THE PEOPLE OF THE STATE OF MONTANA,
Respondents.**

**PETITION FOR WRIT OF CERTIORARI FROM
THE SUPREME COURT OF MONTANA**

PETITIONER'S REPLY BRIEF [RULE 15.6]

**David C. Mogan
In Propria Persona
P.O. Box 366
Hinsdale, Montana 59241
(406) 364-2222**

January 1992



COMES NOW the Petitioner, DAVID C. MOGAN, in his own proper person, dejure; and by these presents files Petitioner's 'Reply Brief' in response to Respondent's Brief pursuant to Rule 15.6 of the Supreme Court Rules, to-wit:

In short and sum, the only argument Respondent has raised is that:

"This Court is without certiorari jurisdiction to review a Montana district court decision as these courts are not 'the highest court of a state in which a decision could be had'." [See page 2, Argument section, paragraph one.]

In the case at bar, Petitioner has made every effort to be heard in the Montana Supreme Court; which such efforts have been thwarted and cut usunder by the Respondent's reliance upon a certain notice: to the which is neither legible nor intelligible [see Appendix "E1"].

As might be expected, the Respondent continues to perpetuate the falsehood about such notice aforesaid and relies upon the same in Respondent's 'Statement of the Case', and states:

"The Musselshell County Attorney served Mogan on January 23, 1991, with a notice of respondent's intent to file a motion to dismiss the appeal pursuant to Mont. R. App. P. 11(c)."

It is this same notice [Appendix "E1"] which the Respondent knows full well is required by Rule 11(c), Mont. R. App. Procedure.

Absent such good and sufficient notice, that is to say absent a legible and intelligible copy of such notice having been served upon Petitioner by Respondent, the dismissal by the Montana Supreme Court is a cut and dried case of violation of the Petitioner's "due process of law".

When the 'War of the Rebellion' was lost, the penalty of association between the several states and the Federal State became known as the XIV Amendment to the United States Constitution.

State courts are prohibited from violating any citizen's "due process of law" by operation of such amendment.

The dismissal of Petitioner's appeal to the Montana Supreme Court constitutes a clear violation of Petitioner's right to "due process of law" in that Petitioner is entitled to a "black letter" application of the Montana Rules of App. Procedure which requires such "notice" as per Rule 11(c) as a prerequisite to dismissal [see Petition, pg. xi].

It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. Boyd v. US, 116 US 616, 635:

Further, it was the State Court itself who was the proximate cause of the delay in submitting the record to the Clerk of the Montana Supreme Court. The Court's attention is directed to Appendices "G1", "G2" and "G3".

Rule 33.1(a), Rules of the Supreme Court provides:

"... every document filed with the Court must be printed by (a process that) ... must produce a clear, black image on white paper ..."

Natural sense and common understanding require all courts to have such a rule and whenever a notice is required; surely it must be legible and intelligible.

Title 28 USC, Section 1257(a), clearly confers Petitioner's right of certiorari rather than prohibiting the same were this Court to apply 28 USC, Section 1257(a), in such a manner as the Respondent seeks to so do; lawlessness would reign supreme in the District of Montana.

This Court has an opportunity, nay a duty, to protect Petitioner's constitutional rights in general and his right to "due process of law" by way of the XIV Amendment in particular.

"No freeman shall be taken or imprisoned or disseised ... except by the ... law of the land." Chapter 39, Magna Charta. The words "due process of law" are intended to convey the same meaning as the words "by law of the land", in Magna Charta. Murray v. Hoboken Land Co., 59 US 272.

CONCLUSION

Respondent's argument is not grounded in law, and Respondent has failed and refused to address any of the issues set forth in Petitioner's 'Petition for Writ of Certiorari'. The federal question of law is based upon "due process of law".

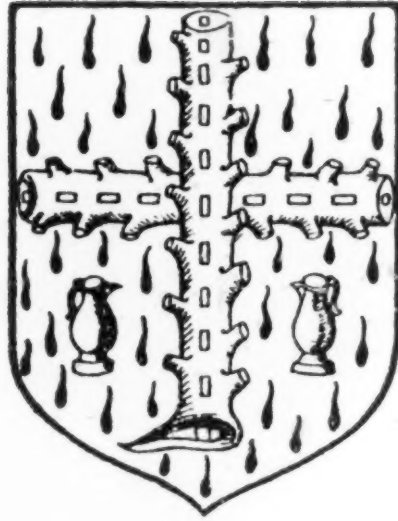
WHEREFORE, the Petition need issue so as to protect Petitioner's XIV Amendment right to "due process of law", the "law of the land".

Respectfully Submitted

DAVID C. MOGAN
In Propria Persona

January, 1992





ARMS ACCREDITED TO ST. JOSEPH

"When a land rejects her legends,
Sees but falsehoods in the past;
And its people view their Sires
In the light of fools and liars,
'Tis a sign of its decline,
And its glories cannot last.
Branches that but blight their roots
Yield no sap for lasting fruits."